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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-541

CITY OF LOS ANGELES,

Petitioner,

v.

FANCHON BLAKE, et al.,

Respondent.

AMICUS CURIAE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF OF COWLITZ COUNTY, WASHINGTON, AS AMICUS CURIAE

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Cowlitz County, a political subdivision of the State of Washington, an amicus curiae herein, prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered in the above-entitled case on May 2, 1979.

IDENTITY OF AMICUS CURIAE

Amicus petitioner Cowlitz County, a political subdivision of the State of Washington, by and through Henry R. Dunn, Cowlitz County Prosecuting Attorney and authorized law officer thereof, files this amicus curiae petition pursuant to Rule 42(4).

QUESTIONS PRESENTED

Amicus curiae petitioner presents two questions, both pertaining to the Blake litigation:

1. Once an employer demonstrates the manifest relationship of its employment standard to the legitimate police practices necessary for safe and efficient law enforcement in its community, does Title VII require the employer to change its method of law enforcement so that it may use an employment selection device that will allow consideration of the largest number of minority applicants?

2. Can the employer prove the "manifest relationship" or "business necessity" of a facially neutral employment standard by any competent relevant evidence, or is the admissible evidence

limited to only that presented by a formal validation research study done pursuant to EEOC guidelines?

STATEMENT OF AMICUS CURIAE PETITIONER'S INTEREST IN CASE

Cowlitz County is located approximately sixty miles north of Portland, Oregon, and 120 miles south of Seattle, Washington. It has a total population of approximately 70,000. The Cowlitz County Sheriff is the law enforcement officer for portions of the county outside incorporated cities and has approximately 45 sworn deputies to cover approximately 1,120 square miles. Approximately 30,000 people live in the incorporated portions of Cowlitz County.

Because of the sparse population served by the Sheriff's deputies and difficulty in obtaining backup support, Cowlitz County relies upon its individual officers to be able to use minimum force to control situations and suspects much the same as does the City of Los Angeles.

Cowlitz County uses height as one of its selection devices for determining which candidates are more likely to make good deputy sheriffs than others. The county has been sued under state statute concerning its height standard and faces potential action under Title VII. Washington state laws against discrimination are substantially similar to the federal. The Washington Supreme Court looks to decisions of this Court and the Ninth Circuit for guidance in interpreting

Washington statutes, as do many other states. Stieler v. Spokane School District, 88 Wn. 2d 68, 558 P.2d 198 (1977). Both sides in the Cowlitz County height discrimination case have agreed in principal that the federal standards for proof will be used to resolve our case.

Thus, Cowlitz County, like many other law enforcement agencies across the country, is vitally interested in and affected by the decision of the 9th Circuit in the Blake case and respectfully requests that this Court review the issues presented herein.

REASONS FOR GRANTING WRIT

ISSUE 1

TITLE VII DOES NOT REQUIRE THE MODIFICATION OF LEGITIMATE PRACTICES NECESSARY FOR SAFE AND EFFICIENT LAW ENFORCEMENT SIMPLY BECAUSE THE MODIFICATION WOULD ALLOW CONSIDERATION OF A LARGER NUMBER OF MINORITY APPLICANTS.

The Court of Appeals in deciding Blake made, in a different fashion, the same mistake corrected by this Court in Furnco Const. Corp. v. Walters, 438 U.S. 567 (1978). Reading the Blake case as a whole, the Court of Appeals held that Title VII required law enforcement agencies to change any selection standard that was a prima facie violation of Title VII if the agency could in any manner modify their methods to require less physical

skills. App. A, page ____ (page 24-25 slip opinion).

The Blake decision is contrary to Furnco. This Court noted in Furnco that changing the employment practice to consider the largest number of minority applicants was neither the purpose nor the spirit of Title VII. Id at 438 U.S. ____, 98 S.Ct. at 2949. If the employer can show a manifest relationship to the job, Title VII does not require changing effective, safe, and tested law enforcement practices. Id; Albe marle Paper Company v. Moody, 422 U.S. 405, 425 (1975). The concern of Title VII is whether the facially neutral standard is merely a "pretext" for unlawful discrimination, not what standards should be changed to allow the most minority applicants. Furnco

Const. Corp. v. Walters, supra, 438 U.S. at ____, 98 S.Ct. at 2950; Albemarle Paper Company v. Moody, 422 U.S. at 425.

ISSUE 2

THE NINTH CIRCUIT MISINTERPRETED TITLE VII'S STANDARDS FOR PROVING THE "MANIFEST RELATIONSHIP" OR "BUSINESS NECESSITY" OF A NEUTRAL EMPLOYMENT STANDARD WHEN IT HELD THAT ONLY A FORMAL VALIDATION RESEARCH STUDY COMPLYING WITH EEOC GUIDELINES (29 CFR §1607) COULD MEET THE "VERY HIGH DEGREE OF PERSUASION" REQUIRED TO REBUT THE PRIMA FACIE CASE MADE BY THE PETITIONER. App. A, page ___, (slip opinion page 18).

The 9th Circuit made a conceptual error in its decision. The basic focus of discrimination cases is whether the

employment standard is a pretext for excluding from employment otherwise qualified applicants because of their race, color, sex, or national origin. Id at 422 U.S. 425. By excluding evidence probative of job relatedness and directing the trial court to consider only formal validation studies, the 9th Circuit unlawfully restricted the employer in proving job relatedness. The City of Los Angeles' brief summarizes existing case law on the evidence necessary to show the business necessity of an employment standard. In addition to limiting the form of probative evidence, the 9th Circuit placed a new burden of proof on the employer by requiring a "very high degree of persuasion" to rebut the plaintiff's prima facie showing. App. A, page ____ (slip opinion page 18).

This burden is without authority in the law in cases decided under Title VII.

In limiting the evidence admissible to prove job relatedness, the 9th Circuit placed the smaller employer in a very difficult position. In order to resist a prima facie case for any kind of facially neutral standard, it must finance extensive professional validation studies. The small employer is barred by the decision from introducing evidence from observations and opinions of people experienced with the job of law enforcement. Amicus petitioners argue that the law allows the trial court in Title VII cases, as in any other case, to weigh the probative value of the various forms of evidence presented to it and decide job relatedness therefrom. The job relatedness of some employment

screening devices is observable by the ordinary person and could be proven without resort to expensive and possibly inconclusive studies. For example, a statistician or psychologist is not required to prove to the trial court that the ability to swim is necessary to being a lifeguard at a particular beach. Other employment screening devices, like the sophisticated personnel test used by the employer in Albemarle Paper Company v. Moody, supra, or the verbal abilities test of Washington v. Davis, 426 U.S. 229 (1976), may well, in the trial court's discretion, require a professionally prepared validation study to prove the manifest relationship to the job in question. The 9th Circuit erred when it held that opinion evidence does not prove job relatedness. App. A,

page ____ (page 19-20, slip opinion).

CONCLUSION

For the foregoing reasons, the City of Los Angeles' petition for writ of certiorari should be granted.

Respectfully submitted,

HENRY R. DUNN
Cowlitz County
Prosecuting Attorney

By FRED [illegible]RG
FRED A. KASEBURG
Chief Civil Deputy

July 11, 1979